UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF

JOHN SANTIAGO, #07A1732 - Petitioner

-against-

D. LACLAIR, SUPERINTENDENT, FRANKLIN C.F - Respondent

REVIEWED BY THE HONORABLE MAGISTRATE JUDGE, G.A. YANTHIS
08 Civ. 9906 (BAT)(GAY)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUPPORTING DOCUMENTS:

WRITTEN OBJECTIONS TO REPORT AND RECOMMENDATION

RELIEF REQUESTED:

THAT A WRIT FOR A HABAES CORPUS AND OR AN EVIDENTIARY HEARING BE GRANTED FOR THE REASONS STATED IN THE INITIAL PETITION AND THE REASONS STATED WITHIN THIS OBJECTION TO THE REPORT AND RECOMMENDATION

ENCLOSED COPY TO:

1). CLERK OF THE COURT
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
300 QUARROPAS STREET
WHITE PLAINS, NEW YORK 10601

2). CHAMBERS OF THE HONORABLE,
GEORGE A. YANTHIS, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
300 QUARROPAS STREET
WHITE PLAINS, NEW YORK 10601

PREPARED BY: JOHN SANTIAGO - PRO-SE LITIGANT
AUBURN CORRECTIONAL FACILITY
135 STATE STREET P.O. BOX 618

STATES DISTRICT COURT
N DISTRICT OF NEW YORK:
----------x
matter of the application of

NTIAGO, #07A1732
titioner,

gainst-

AIR, SUPERINTENDENT, FRANKLIN C.F.
spondent,
----------x

OBJECTIONS TO RI
AND RECOMMENDAT

08 civ. 9906 (BA

F NEW YORK)
OF CAYUGA)ss:

I, **John Santiago**, am the petitioner in the above entitled-acti the following statements to be true under the penalties of perjur

1). I am a Pro-Se litigant in the above entitled-action and as y familiar with the facts of this matter.

2). I submit this "Written Objections" in opposition to the Ho ate Judge, George A. Yanthis, Report and Recommendation, that pet r habeas corpus be denied for the reasons therein.

3). I prepared this written objection upon information and bel oon my research and review of the entire record and report and re

4). I, John Santiago, from herein would be referred to as peti District Attorney's Office whom represent the Superintendent, wo l to as the respondent.

5). Please take notice, that this objection is being filed in directive of the report and recommendation of the Hon. [illegible]

6). On November 12, 2010, petitioner received a copy of said r
ommendation and is hereby complying with said directive and submi
objection in a timely fashion, which a copy has been forwarded t
f this Court.

7). Please refer to the attached "written objection" to the re
ommendation of the Honorable George A. Yanthis, United States Mag

John Santiago, #07
Auburn Correctiona
135 State Street,
Auburn, New York 1

rk of the Court
ted States District Court
Quarropas Street
te Plains, New York 10601

STATES DISTRICT COURT
N DISTRICT OF NEW YORK:
----------x
matter of the application of

NTIAGO, #07A1732
titioner,

gainst-

AIR, SUPERINTENDENT, FRANKLIN C.F.
spondent,
----------x

OBJECTIONS TO
AND RECOMMENDA

08 Civ. 9906 (

THE HON. DISTRICT JUDGE, BATTS:

OBJECTIONS TO REPORT AND RECOMMENDATION:

1). In addressing the present writ, this Honorable Court shoul that petitioner is proceeding as a pro-se litigant, hence, his s be held, "to a less stringent standards than formal pleading draf ..." **Hughes v. Rowe, 449 U.S. 5, 9. Ferran v. Town of Nassau, 11 Cir. 1993).** Therefore, this Court should read the pleading of th ner herein, liberally and interpret them to raise the strongest a ggest. **McPherson v. Coombe, 174 F.3d 276, 280 (2nd Cir. 1999).** Ne itioner is also aware that pro-se status does not exempt a party nce with relevant rules of procedural and substantive law. **Tragut 10 F.2d 90, 95 (2nd Cir. 1983).**

POINT ONE - IN OBJECTION:

2). The Magistrate Judge, George A. Yanthis, concluded that pe

ion is contrary to petitioner's contention. Thus, he has not prov
id convincing evidence to refute the state court's finding. (repo
ndation, pg 6.)

3). The Honorable Judge, Yanthis, went on further to conclude
ner also failed to establish that the state court's decision was
involved an unreasonable application of, the **Strickland** standard.
...[p]etitioner fails to overcome the presumption that, under th
tances, his counsel's action could be considered a sound defense

4). Nevertheless, despite the provision of the plea allocution
ner retains the right to contend that there were errors in the pr
d to the acceptance of petitioner's guilty plea. Therefore, the p
ion is not the factual basis for review and this Court should tur
tence of counsel's performance prior to the plea.

5). Turning to the principles that are governing in the matter
nder Supreme Court Precedent, **Hill v. Lockhart, 474 U.S. 52, (198**
p prong of **Strickland v. Washington, 466 U.S. 668,** does apply. Hc
defendant enters a guilty plea upon counsel's advice, the volunt
plea depends on whether the advice was within the range of compet
d of attorney in criminal cases. **Hill v. Lockhart, 474 U.S. 52.**

6). Petitioner pleaded guilty in accordance with counsel's adv
y 5, 2007. Therefore, this Court must turn its attention to the r
sel's advice and the basis that counsel relied upon, in determini
ndation into pleading guilty, and as a result, whether such recon

e circumstances, his counsel's action could be considered a soun
. (Report and Recommendation, pg 6.). Under **Strickland v. Washin**
Court agreed that the six Amendment imposes on counsel a duty to
reasonably effective assistance must be based on professional de
rmed legal choices that can be made only after investigation of
t observed that counsel's investigatory decision must be assesse
nformation known at the time of the decision, not in hindsight,
mount of pretrial investigation that is reasonable defies precis
ent." The Court also concluded that; [t]he reasonableness of cou
ay be determined or substantially influenced by the defendant's
ts or actions. Counsel's action are usually based, quite properl
l strategic choices made by the defendant and on information supp
ndant. In particular, what investigation decision are reasonable
ly on such information.

8). Here, counsel was informed that petitioner had a witness t
ory testimony and that said witness was located in the same Coun
itioner was in at the time. Counsel just flat out refused to inv
ential witness and continued to advise petitioner to plea guilty
5, 2007, during the jury selection; petitioner pleaded guilty u
s advice. Petitioner accepted counsel's advice and pleaded guilt
s, without any corroborating evidence or testimony that petition
of the fraudulent status of the gift card, petitioner was doomed

and all other related material to substantiate his claims and th
said motion, nor did it even want to grant an evidentiary hearing
act, petitioner's claims were true, hence, petitioner has no othe
on, but to allege.

9). The Supreme Court in **Strickland,** clearly stated that..."[i
one plausible line of defense...counsel must conduct a 'reasonabl
gation' into the line of defense, since there can be no strategic
nders such an investigation unnecessary." Petitioner only had one
"that he did not know the gift card was fraudulent." Therefore,
obligation to conduct an investigation to determine whether petit
plea guilty or not, without having a basis to determine such reco
ounsel's performance fell below the range of competence demanded
inal cases. As a result, the lack thereof, cannot be inferred as
ic and tactical alternative.

POINT TWO - IN OBJECTION:

10). In the report and recommendation, the Hon. Judge Yanthis,
int two of petitioner's claim be dismissed on the basis that peti
ge that absent said deficiency, he would have pleaded not guilty
to trial. As such, petitioner did not allege he suffered prejud
mmendation, pg. 8, para 3.).

11). Petitioner does not agree with the report and recommendat
o abandon this claim (point two, counsel was unfamiliar with the
le law of indictment)

POINT THREE - IN OBJECTION:

12). Petitioner would like to clarify, reiterate and emphasize not contest the revocation of parole as the respondent wish for o believe, so as to place the focus on the "collateral consequenc e" to dismiss petitioner's writ.

13). Here, petitioner is contending that Penal Law 70.25(2-a) 30 (1)(b) had such a definite, immediate and largely automatic ef ge of punishment as to constitute a direct consequence of the ple ng the maximum negotiated term.

14). Under Supreme Court precedent, **Brady v. United States, 39 rth Carolina v. Alford, 400 U.S. 25, 31,** a defendant has a consti cess right to be informed of the direct consequences of his plea, connote. In the matter at hand, although, petitioner was eventua ed to the negotiated 1½ to 3, that sentence was directed to run c ndischarged term. In accordance with case law from the Appellate v. **Morbillo, 56 A.D.3d 694 (3rd dept. 2008),** the imposition of a e, to an undischarged term, is a "direct consequence" and therefo nd/or counsel must inform the defendant prior to the plea, that h consecutive to his undischarged term, if not, the plea cannot b ly and intelligently, in violation of the due process clause. **Peo N.Y.3d 242 (2005).** This principle involves an unreasonable appli al Law and contrary to Supreme Court precedent. **Brady v. United**

15). Petitioner's negotiated sentence of a 3 year maximum term

ted sentence, violates the double jeopardy clause. **United States** esco, **449 U.S. 117,** emphasis added.

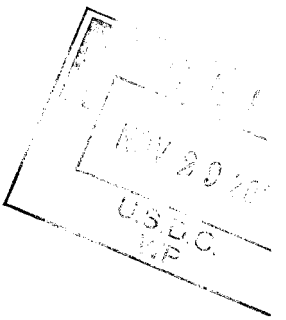
16). Petitioner's supplemental pleadings was evidence that pet ed parole board appearance after the legal requirements of the ne maximum, continues to be reviewed for discretionary release for t (Att. CPFI 2°) that petitioner has completed the legal requireme l years. This is undisputed, a direct consequence.

17). This matter is not identical to **Wilson v. McGinnis, 413 F** r. **2005),** where the court addressed two consecutive state sentenc rt ruled that because the trial court had the "discretion" to sen endant to concurrent or consecutive terms, under Penal Law 70.25 secutive sentence imposed was a collateral consequence. Here, pet that there is no discretion in the trial court under Penal Law 70 refore, renders the consecutive sentence imposed, a direct conseq etitioner should have been informed about, prior to the plea, sin tory statute that imposes an enhanced punishment on petitioner's

WHEREFORE, petitioner relies upon his Memorandum of Law, in Re ndent's Opposition and the contentions herein, for this court no rt and recommendation as set forth by the Honorable Judge Yanthi rder an evidentairy hearing to determine whether counsel was ine erformance and whether petitioner plea was entered knowingly and

John Santiago, #07A1732
Auburn Correctional Facility
135 State Street, P.O.Box 618
Auburn, New York 13024

November 22, 2010



f the Court
States District Court
n District of New York
rropas Street
lains, New York 10601

Civ. 9906 (Bat)(GAY).

urt Clerk:

Please find enclosed an original copy of a "written objection'
d by a report and recommendation by the Hon. George A. Yanthis.
n, a copy is being forwarded to your office as directed by the H
, in his report. This written objection is being filed in a time
and therefore, the District Judge has the necessary documents t
with review and render a determination. Thank you for your time

John Santiago, #07A17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM
Pro Se Office

e Honorable Deborah A. Batts, USDJ

Se Office, x0177 (PM)

ecember 6, 2010

ntiago v. J. Laclair, No. 08 Civ. 9906

attached document, which was received by this Office on 11/30/10, has
o the Court for filing. The document is deficient as indicated below. Inste
the document to the docketing unit, I am forwarding these papers to you for
n. See Fed. R. Civ. P. 5(d)(2)(B), (4). Please return this memorandum with the att
is Office indicating at the bottom what action should be taken.

riginal signature.

ffirmation of service/proof of service

document appears to be a request in the form of a letter.

r:_____

EPT FOR FILING ( ) RETURN TO *PRO SE* LITIGAN